

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVELOUS A. X. GREENE,

Plaintiff, No. CIV S-05-0330 GEB JFM P

vs.

C. D. C., et al., ORDER
Defendants.

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On April 4, 2006, defendants filed a motion to dismiss for failure to exhaust administrative remedies pursuant to the non-enumerated part of Fed. R. Civ. P. 12(b) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). On August 31, 2005, the court advised plaintiff of the requirements for opposing a motion pursuant to the non-enumerated part of Fed. R. Civ. P. 12(b). See Wyatt v. Terhune, 315 F.3d 1109, 1120 n.14 (9th Cir. 2003). In that same order, plaintiff was advised of the requirements for filing an opposition to the pending motion and that failure to oppose such a motion might be deemed a waiver of opposition to the motion.

On May 19, 2006, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In the same order, plaintiff was

1 informed that failure to file an opposition would result in a recommendation that this action be
2 dismissed pursuant to Fed. R. Civ. P. 41(b). On June 14, 2006 and July 20, 2006, plaintiff
3 received extensions of time to file and serve an opposition to the motion. The July 20, 2006
4 order set a final deadline of September 12, 2006 for the filing of plaintiff's opposition or
5 statement of non-opposition. That deadline expired without a timely response from plaintiff.
6 Accordingly, on September 29, 2006, this court recommended dismissal of this action pursuant
7 to Federal Rule of Civil Procedure 41(b) as a sanction for plaintiff's failure to comply with the
8 May 19, 2006 order.

9 On October 10, 2006, plaintiff filed objections to the findings and
10 recommendations. Therein, he contends that staff at High Desert State Prison lost three boxes of
11 his personal legal property and asking the court to stay this action pending resolution of the
12 administrative grievance he filed seeking return of his property.

13 Good cause appearing, the findings and recommendations will be vacated and
14 plaintiff will be given one final opportunity to file an opposition to defendants' April 4, 2006
15 motion to dismiss. The Clerk of the Court will be directed to send plaintiff a copy of defendants'
16 April 4, 2006 motion to dismiss and the attachments thereto together with a copy of this order
17 and the court's August 31, 2005 order, which sets forth the requirements for opposing a motion
18 to dismiss based on an alleged failure to exhaust administrative remedies. Plaintiff will be given
19 one final period of twenty-one days in which to file and serve an opposition to defendants'
20 motion, and defendants will be granted seven days thereafter in which to file and serve a reply
21 brief. Plaintiff's request to stay this action will be denied, and no further extensions of the
22 deadline for responding to defendants' motion will be granted for any reason. Plaintiff is
23 cautioned that failure to file an opposition to defendants' motion in accordance with the deadline
24 set in this order will result in a recommendation that this action be dismissed.

25 In accordance with the above, IT IS HEREBY ORDERED that:

26 1. The findings and recommendations filed September 29, 2006 are vacated;

2. The Clerk of the Court is directed to send plaintiff a copy of defendants' April 4, 2006 motion to dismiss and all attachments thereto and a copy of the court's August 31, 2005 order together with a copy of this order;

3. Plaintiff is granted twenty-one days from the date of this order to file and serve an opposition to defendants' April 4, 2006 motion to dismiss;

4. Defendants' reply, if any, shall be filed and served not later than seven days thereafter; and

5. No extensions of the deadlines set in this order will be granted for any reason.

DATED: January 29, 2007.

John F. Wark
UNITED STATES MAGISTRATE JUDGE

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